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IN THE

Supreme Court of the United States

October Term, 1967.

No. 856

WILLIAM P. KENNEY,

Petitioner,

v.

CALIFORNIA TANKER COMPANY,
A Corporation of the State of Delaware,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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WILLIAM P. KENNEY,

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CALIFORNIA TANKER COMPANY,
A CORPORATION OF THE STATE OF DELAWARE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States.

William P. Kenney respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals For the Third Circuit affirming an order of the United States District Court for the District of Delaware dismissing, with prejudice, Petitioner's seaman's action pursuant to the Jones Act and pursuant to the General Maritime Law for unseaworthiness and for maintenance and Cure, for failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b) and Rule 12 of the United States District Court for the District of Delaware.

OPINIONS BELOW.

The opinion of the United States Circuit Court of Appeals for the Third Circuit, dated and filed July 28, 1967, is as yet unreported but is reprinted in Appendix H to this Petition (A21).

No opinion or finding of fact and law was filed by the United States District Court for the District of Delaware. The orders of that Court are reprinted in Appendices E and F to this Petition (A18, A19). The District Court did order that the proceedings on the Order to show cause why the Libel should not be dismissed be transcribed and these proceedings are reprinted in Appendix C to this Petition (A5-A14).

JURISDICTION.

The jurisdiction of this Court is invoked under 28 U. S. C. 1254 and United States Supreme Court General Rule 19(b).

DATE OF JUDGMENT SOUGHT TO BE REVIEWED.

The judgment was dated July 28, 1967 and was entered on the same day with no time stated.

DATE OF THE ORDER RESPECTING REHEARING.

The order denying rehearing was dated August 30, 1967 and entered the same day.

STATUTORY PROVISIONS.

28 U. S. C. 1254, 28 U. S. C. 2101 and 46 U. S. C. 688.

QUESTIONS PRESENTED.

I. IS THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES VIOLATED WHERE A RULE OF COURT IS APPLIED RETROACTIVELY?

II. IS IT AN ABUSE OF DISCRETION FOR A JUDGE OF A FEDERAL COURT TO DISMISS, WITH PREJUDICE, A SEAMAN'S ACTION WITHOUT A DETERMINATION OF THE MERITS THEREOF, WHERE THE SEAMAN, THE WARD OF THE COURT, HAS DISOBEYED NO ORDER OF THE COURT?

III. IS THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES VIOLATED WHERE A COURT DISMISSES AN ACTION WITH PREJUDICE, THEREBY RENDERING JUDGMENT ON THE MERITS WITHOUT FILING FINDINGS OF FACT AND CONCLUSIONS OF LAW AS REQUIRED BY THE FEDERAL RULES OF CIVIL PROCEDURE AND THE GENERAL RULES OF THE UNITED STATES SUPREME COURT?

IV. IS THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES VIOLATED WHERE A MAN IS CITED TO SHOW CAUSE WHY HIS ACTION SHOULD NOT BE DISMISSED UNDER A SPECIFIC RULE OF COURT AND THAT COURT'S ACTION IS THEN UPHELD BY A REVIEWING COURT ON THE BASIS OF THE INHERENT POWER OF A COURT TO CONTROL ITS CALENDAR ABSENT ANY RULE.

CONSTITUTIONAL PROVISIONS AND STATUTES AND RULES INVOKED.

The Fourteenth Amendment to the Constitution to the United States provides:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article I, Section 9, paragraph 3 of the Constitution of the United States provides:

> "No Bill of Attainder or ex post facto Law shall be passed."

Former Rule 38 of the General Admiralty Rules of Practice for the Courts of the United States, provided:

> "Dismissal for Failure to Prosecute
>
> If, in any admiralty suit, the libellant shall not appear and prosecute his suit, and comply with the orders of the court, he shall be deemed in default and contumacy; and the court may, on the application of the respondent or claimant, pronounce the suit to be deserted, and the same may be dismissed with costs."

Rule 41(b) of the Federal Rules of Civil Procedure, provides:

> "Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him.

After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. In an action tried by the court without a jury the court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order or dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits."

Rule 52 of the Federal Rules of Civil Procedure, provides:

"Findings by the Court.

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Request for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of

law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in Rule 41(b).

(b) Amendment. Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment."

Rule 1 of the United States District Court for the District of Delaware provides:

"Scope of Rules.

These Rules govern the procedure in the United States District Court for the District of Delaware in all cases that the Federal Rules of Civil Procedure are applicable."

Rule 12 of the United States District Court for the District of Delaware provides:

"Dismissal of Actions for Failure to Prosecute.

Subject to the provisions of Rule 23(c) F. R. C. P., in each clause pending, wherein no action has been taken for a period of one year, the Court may, on its own motion or upon application of any party and after reasonable notice, enter an order dismissing such cause unless good reason for the inaction is given. An application for a continuance shall not be deemed to be an action for precluding such dismissal. After any such application for dismissal has been filed, no application

for a continuance or any proceeding taken under the discovery rules, F. R. C. P., shall be deemed to toll the application of this Rule."

Rule 1 of the Federal Rules of Civil Procedure provided, prior to July 1, 1966:

"Scope of Rules.

These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action."

Rule 81(a) (1) of the Federal Rules of Civil Procedure, provided, prior to July 1, 1966:

"(a) To What Proceedings Applicable.

(1) These rules do not apply to proceedings in admiralty. They do not apply to proceedings in bankruptcy or proceedings in copyright under Title 17, U. S. C., except in so far as they may be made applicable thereto by rules promulgated by the Supreme Court of the United States. They do not apply to probate, adoption, or lunacy proceedings in the United States District Court for the District of Columbia except to appeals therein."

46 U. S. C. 688:

"Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the per-

sonal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

Article 3 § 2 of the United States Constitution:

"The general power shall extend to all cases * * * of Admiralty and Maritime jurisdiction;—* * *"

28 U. S. C. 1254:

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State stature held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy."

28 U. S. C. 1333:

"The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

(2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize."

Supreme Court General Rule 19(b):

"Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

STATEMENT OF THE CASE.

Petitioner, William P. Kenney, filed his libel in the United States District Court for the District of Delaware on October 29, 1962. The libel contained three causes of action, namely (1) a claim for damages under the so called Jones Act (46 U. S. C. 688) (2) a claim for aggravation of injuries under the General Maritime Law and (3) a claim for maintenance and cure pursuant to the General Maritime Law. Issue was joined and interrogatories were posed and answered in part.

In October of 1964 the district court, sua sponte, ordered that the libel would be "dismissed pursuant to Rule 12 of this court" unless good cause for lack of action were shown at a hearing. The action was not dismissed. Apparently the Court was satisfied at that time.

By the spring of 1966 the case was ready for trial as far as procedural matters were concerned, with the exception of one outstanding interrogatory.

On November 1, 1966, the district court entered another order that the Court "sua sponte, will dismiss the action with prejudice under F. R. C. P. 41(b) and Rule 12 of this District Court" unless the libellant could establish at a hearing good reason for its inaction since October 25, 1965 (Appendix B, A4).

This then brought into question, whether Rule 41(b) F. R. C. P. was applicable. It was not for it provides that the motion shall be by the defendant and makes no reference to action by the Court sua sponte.

Rule 12 of the United States District Court for the District of Delaware (p. 6, *supra*), did not become applicable to proceedings in Admiralty until July 1, 1966 and therefore a year had not yet expired. Argument was had solely on the question of the retroactive application of this rule (A5-A14). The Court fully recognized this, and applied the rule retroactively and dismissed the case with prejudice,

therefore this constituted an adjudication on the merits (Rule 41(b) F. R. C. P.) (p. 4, *supra*).

The District Court made no special finding of facts and did not state its conclusions of law separately, unless the transcribed record of that proceeding can be considered as such (A5-A14). In that event there is no indication that the District Court would have dismissed the action with prejudice if it had not been relying on Rule 41(b) F. R. C. P. and Rule 12 of the United States District Court for the District of Delaware.

Appeal was taken to the United States Circuit Court of Appeals for the Third Circuit to review the action of the District Court.

The United States Circuit Court of Appeals for the Third Circuit sustained the District Court and denied a petition for rehearing (Appendix J, A27).

ORIGINAL JURISDICTION.

The jurisdiction of the United States District Court for the District of Delaware was based on 46 U. S. C. 688, the amount in controversy being in excess of Ten Thousand ($10,000.00) Dollars and the General Admiralty law as set forth in Article II, § 3 of the United States Constitution and 28 U. S. C. 1333.

REASONS FOR GRANTING THE WRIT.

It Is Important That This Court Delineate to the Trial Courts the Extent to Which They Are to Apply the Rule Laid Down in Link v. Wabash, Particularly Where the Action Involves a Seaman.

This action involves a seaman's right to recover under the so-called Jones Act (46 U. S. C. 688) coupled with his right under the General Maritime Law to recover for damages allegedly resulting from failure, to render prompt and adequate medical attention and action for denial of adequate maintenance and cure.

Rule 41(b) F. R. C. P. did not apply to Admiralty Proceedings until July 1, 1966. Even if applicable, no action had been taken by the defendant to avail himself of that rule and it therefore was an abuse of discretion for the District Court to apply this rule.

Rule 12 of the United States District Court for the District of Delaware did not become applicable to proceedings in Admiralty until July 1, 1966. Less than five months had therefore elapsed when the District Court applied the rule retroactively.

The United States District Court recognized it was applying the rule retroactively when it answered the following question and gave the following answer:

> "Mr. Wise: In doing it you are bearing in mind the fact that the applicable rule that your Honor is dismissing under, of the case not having had any action taken on it in a year, did not become effective until June, so that only less than five months have expired under that rule?
>
> The Court: I have that point in mind." (A14)

This then constituted a retroactive application of the rule. Counsel could not anticipate that the Court would

apply a rule retroactively without giving any advance warning. Such a practice was criticized by this Court in *Bouie v. City of Columbia,* 84 S. Ct. 1697, 378 U. S. 347, 12 L. Ed. 2d 894 when it said:

> "Indeed, an unforseeable judicial enlargement of a criminal statute applied retroactively operates precisely like an ex post facto law, such as Art. I § 10 of the Constitution forbids." (378 U. S. 353; 12 L. Ed. 2d 899)

Thus, the Circuit Court applied the strict rule of *Link v. Wabash,* 370 U. S. 628, 8 L. Ed. 2d 734, 82 S. Ct. 1386, even though there had been no disobedience to a Court order and the Court made no investigation into the merits of its wards case.

The Public Interest Requires That the Court Define Again the Responsibility of the Trial Courts for Their Wards.

Prior to July 1, 1966 seamen's actions in Admiralty were not governed by the Federal Rules of Civil Procedure. Therefore, Rule 12 of the United States District Court was not applicable to the instant action. The only rule, other than the inherent power of a Court to dismiss for lack of prosecution, was General Admiralty Rule 38. Under this rule the Court could, on application of the Respondent or Claimant, dismiss the case with costs if "the Libellant should not appear and prosecute his suit, and comply with the orders of the Court". No such application had been made in the instant case and the Libellant had not disobeyed any order of the Court.

The only neglect of the seaman was the action of his attorney in not asking to have the case marked for trial until the seaman had tried the latest cures recommended for a sufficient time to permit his medical expert to form a reasonable judgment as to their efficacy (A16). True,

this was more than six years after the injury, but the new treatment prescribed was entirely different from what had been recommended for the past six years (A16).

We know not what the conclusions of law were by the District Court Judge for he filed none. It is difficult to ascertain just what the decision of the Circuit Court of Appeals decided. It would appear that it held that even if Rule 41(b) F. R. C. P. and Rule 12 of the United States District Court were not authority for dismissal nevertheless the dismissal was proper, but the lower Court relied on the wrong authority, it should have relied on its inherent power.

Counsel for petitioner was never cited to show cause why this power should not be exercised. Hence, the litigant was never afforded a chance to meet the charge against him.

The decision in *Boudreau v. United States,* 250 F. 2d 209, C. C. A. 9th 1957 relied on by the Circuit Court of Appeals is not apposite. There the Court had a rule which had been applicable to the action and the requisite time had long since expired since it became applicable. The case had been brought up for dismissal three times over a period extending from December 30, 1954 to March 11, 1957. The statement that the Court could have dismissed under its inherent power is dictum as it was not necessary to make this finding to uphold the lower Court's action. But, of greater significance is the finding that the "district court's discretion was exercised after the most careful investigation and fair treatment of the appellant by having his deposition taken, in which no excuse was shown for the purposeful delays." (P. 211). Compare this with the instant case where the Court dismissed, with prejudice, after a summary hearing and in spite of an affidavit by Counsel that the case could not be ready for trial until the spring of 1967 due to the new course of cure recommended (A17).

The case of *Link v. Wabash, supra,* is not apposite. There the Court acted under its inherent power, not pursuant to one inapplicable rule and one rule which had only been applicable for less than five months. It is not argued in the instant case that the Court, after reasonable investigation, could not have dismissed the present action under its inherent power. It is only submitted that it didn't do so and that the authority it relied on didn't authorize it to do so. However, in *Link v. Wabash, supra,* the Court was not the guardian of the plaintiff, and plaintiff's attorney had failed a scheduled hearing.

In the instant case, a mass of motions were not made. Efforts were made by correspondence to obtain a full answer to an interrogatory. When this failed petitioner was brought to Wilmington so as to have a doctor examine him and be in a position to explain to the Court in person, the nature of the injury, the necessary treatment and prognosis for the future (A16). This was done in June of 1966 after all preliminary steps had been completed except one outstanding interrogatory. As a result of this determination it was found that the case would not be in a posture for trial until after the cold weather, or such was the opinion of Counsel (A16). The District Court either ignored this or disbelieved Counsel or felt it was irrelevant inasmuch as no Court action had been taken for a year. We know not for he made no finding of fact or law.

As this Court has said in approving the language of Judge Schnackenberg in *Link v. Wabash, supra:*

> "Plaintiffs cause of action * * * was his property. It has been destroyed. The District Court to punish a lawyer, has confiscated another's property without process of law, which offends the Constitution. * * *"

In the instant case the lawyer's dereliction was in not marking the case for trial until in his opinion he could present it fairly for his client.

The case of *Torino v. Texaco, Inc.*, 378 F. 2d 268, C. C. A. 3 (1967) is inapposite. There the plaintiff consistently disobeyed orders of the Court, orders directed to the plaintiff himself, not his attorney. The Court found that:

> "The pivotal fact in the disposition of this case is that the plaintiff failed to comply with the district court's order requiring him to state that he would be present for both the pre-trial and the trial. He not only failed to state that he would appear; he failed to appear." (P. 270)

Furthermore, *Torino v. Texaco, Inc., supra,* was a civil action and did not deal with a seaman's rights under General Maritime Law.

It Is Important That This Court Lay Down a Guideline to the Courts in Following the Requirements of the Rules of Civil Procedure.

Rule 41(b) F. R. C. P. provides, with certain exceptions not here applicable, that a dismissal thereunder operates as an adjudication on the merits. The same rule requires that the Court shall find facts and state separately its conclusions of law, which may be set forth in an opinion or memorandum of decision, if filed. It is submitted that the transcript of the hearing on the Court's motion does not meet his requirement. The practice of not following the letter of the rule has been strongly condemned. (See *Roberts v. Ross,* 344 F. 2d 747, C. C. A. 3rd 1965). It is not due process of law to rigidly apply the rules to a party and not have the tribunal applying these rules abide by them.

The Circuit Court of Appeals Has Departed from the Accepted Course of Procedure by Considering on Appeal a Matter Not Presented or Relied On in the Lower Court.

Petitioner was cited to appear before the District Court and show cause why his case should not be dismissed pursuant to Rule 41(b) F. R. C. P. and District Court Rule 12 (A4). Rule 41(b) F. R. C. P. is applicable to motions by a defendant. Petitioner's counsel went to Court to argue the applicability of this rule. That is he was to have his day in Court on the applicability of that rule and District Court Rule 12. Since the defendant had taken no action to dismiss Rule 41(b) was not appropriate.

Rule 12 of the District Court did not become applicable until July 1, 1966 when the Federal Rules of Civil Procedure became applicable to Admiralty actions of a civil nature (p. 6, *supra*). The action was dismissed under this rule on November 16, 1966, four months and 16 days after it became applicable. No date was fixed for a reasonable time for compliance with the rule once it became effective so, it is submitted, it was reasonable to assume it would be applied if no action was taken within a year after its effective date. The Court recognized it was applying the rule retroactively (A14).

The Circuit Court of Appeals, however, refused to pass directly on this question, but appears to say that the Court could have done it under its inherent power so that this question is moot.

The question of the inherent power of the Court to dismiss and whether the Court would have done so under this power was never presented and the petitioner never had an opportunity to present his side on this question. It is submitted that it was improper for the Circuit Court of Appeals to consider this power on appeal. As this Court said in *Helvering v. Tex-Penn Oil,* 300 U. S. 481, 57 S. Ct. 569, 81 L. Ed. 755 (1937):

> "The Commissioner's notices of deficiency do not suggest the construction for which he now contends. * * * The taxpayers were entitled to know the basis of law and fact on which the Commissioner sought to sustain the deficiencies." (300 U. S. 498, 57 S. Ct. 577)

Paraphrasing the above language, the District Court notice of inaction in the instant case did not suggest the construction argued by the Circuit Court of Appeals. The petitioner was entitled to know the basis of law and fact on which he was appealing.

CONCLUSION.

It is respectfully submitted that this petition for a Writ of Certiorari should be granted.

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Attorney for Petitioner.

APPENDIX A.

IN THE
UNITED STATES DISTRICT COURT

IN ADMIRALTY

WILLIAM P. KENNEY,

v.

CALIFORNIA TANKER COMPANY,
A DELAWARE CORPORATION.

LIBEL IN PERSONAM WITH INTERROGATORIES ATTACHED.

ACTION BY SEAMAN WITHOUT PREPAYMENT OF COSTS,
28 U. S. C., SEC. 1916

To the Honorable Judges of the Said Court:

The libel of William P. Kenney avers, to wit:

FIRST CAUSE OF ACTION.

1. Libellant is a resident of the State of Massachusetts and at all times hereinafter referred to was a seaman and a member of the crew of the Tanker SS Rocklanding and an employee of the respondent.

2. The respondent, California Tanker Company, is a Delaware corporation and at the times hereinafter referred to was the owner of the SS Rocklanding and the said California Tanker Company, its agents or servants were the employer of the libellant.

3. On or about February 21, 1960 while libellant was a member of the crew aboard the said SS Rocklanding at sea he received personal injuries.

4. His said injuries were not due to any fault of his.

5. As a result of said injuries the libellant was in need of immediate and proper medical attention but the said respondent failed, neglected and refused to give him prompt and adequate medical attention or to obtain the same for him as a result whereof libellant suffered great pain, has been permanently injured, has suffered mental anguish, personal humiliation and occurred medical expenses and loss of time from his work, is in need of further medical care and attention and will suffer further time from his work in obtaining such medical care and attention.

6. This action is brought under the Merchant Marine Act of 1920 known as the Jones Act.

WHEREFORE libellant demands judgment against respondent in the amount of FIFTY THOUSAND DOLLARS ($50,000.00) together with interest and costs.

SECOND CAUSE OF ACTION.

7. Libellant realleges and sets forth as fully as if included herein the allegations contained in Paragraph 1 through 5 of his first cause of action.

8. That the injuries received by libellant were aggravated by the fault of the respondent, its agents or servants as follows:

a. Failure to provide a seaworthy vessel with an adequate trained personnel in charge of administering medical care.

b. Failure to provide the aforesaid vessel with an adequate and competent crew and master.

c. Said vessel was unseaworthy in that she did not have on board necessary and proper medical supplies

to properly treat your libellant pending such time as he should have been transferred for further treatment.

9. This cause of action is brought under the General Maritime Law for so called unseaworthiness.

WHEREFORE libellant demands judgment against respondent in the said sum of FIFTY THOUSAND DOLLARS ($50,000.00) together with interest and costs.

THIRD CAUSE OF ACTION.

10. Libellant realleges and incorporates herein as fully as if set forth herein the allegations contained in Paragraph 1 through 5 of his first cause of action.

11. As a result of said injuries libellant has incurred expenses for cure and maintenance, was entitled to an allowance for maintenance and cure for a long time in the past and upon information and belief will incur expenses for maintenance and cure in the future and be entitled to receive an allowance for maintenance and cure in the future.

12. This cause of action is brought under the General Maritime Law for maintenance and cure.

WHEREFORE libellant demands judgment against respondent for maintenance and cure in such amount as to this Court shall be deemed meet and proper.

WHEREFORE libellant prays that a citation in due form of law according to the rules and practice of this Honorable Court in a cause of admiralty and maritime jurisdiction may issue against said respondent herein citing it to appear and answer all and singular the matters aforesaid.

/s/ HENRY A. WISE, JR.,
Proctor for Libellant.

[Jurat omitted.]

APPENDIX B.

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

IN ADMIRALTY No. 1842

WILLIAM P. KENNEY,

v.

CALIFORNIA TANKER COMPANY,
A DELAWARE CORPORATION.

ORDER.

AND NOW, TO WIT, this 1st day of November, 1966, it appearing to the Court that no action has been taken for a period of one year; viz., since October 25, 1965 when Libellant filed a motion for an order compelling Libellee to respond fully to interrogatory No. 13, the Court, *sua sponte,* will dismiss the action with prejudice under F. R. C. P. 41(b) and Rule 12 of this District, unless at a hearing to be held at 2:15 o'clock P. M. on November 10th, 1966, Libellant establishes good reason for its inaction.

Notice of the entry of this Order shall be given to the parties by the Clerk Mailing a copy thereof to their attorneys of record.

/s/ EDWIN D. STEEL, JR.,
D. J.

APPENDIX C.

TRANSCRIPT OF HEARING BEFORE JUDGE STEEL ON NOVEMBER 10, 1966.

(1)*

Wilmington, Delaware,
November 10, 1966.

Before: Hon. Edwin D. Steel, Jr., U. S. District Court Judge.

Present: Henry A. Wise, Jr., Esq., for the Libellant;
Rodney M. Layton, Esq., of Richards, Layton & Finger, for the Respondent.

(2)

The Court: This is the time which was fixed by this Court's order of November 1, 1966 for determining whether the present action, that is Kenney v. California Tanker Company, In Admiralty No. 1842, should not be dismissed under Federal Rules of Civil Procedure 41(b) and Rule 12 of this District because of inaction for over a year, viz., since October 25, 1965.

Does anyone care to be heard?

Mr Wise: Your Honor, I have submitted to the Court a memorandum calling the Court's attention to the fact that General Admiralty Rule 38, which as far as I know is still in effect——

The Court: Which Admiralty Rule is that?

Mr. Wise: General Admiralty Rule Number 38 of the Supreme Court.

* Figures in parentheses refer to page numbers of typewritten transcript.

The Court: Well, now, the Admiralty Rules, as promulgated by the Supreme Court, were rescinded on July 1 of '66 and supplemental rules were enacted on that date which embodied by reference the Rules of Civil Procedure. Have you had any authority that that Admiralty Rule 38 is in effect today?

Mr. Wise: Not that it is in effect today, but that it was in effect when the beginning of this year started.

The Court: On June 30, 1966?

(3)

Mr. Wise: Yes; at the time of the period that we are dealing with, which was October 25, it was in effect. But in addition to that, I pointed out to the Court that while there has been no Court action taken between the 25th of October, 1965 and the 4th of November that steps were taken.

Now, I haven't found any decisions—there may be—as to what the meaning of the words "no action" is. We did have one matter in this Court which was—I can't remember the name of it, but it was somebody against Wanderlust, where the rule was brought up that is in vogue, and I pointed out to Judge Layton that while no formal discovery procedure had been filed in Court, we nonetheless were taking action in the case because we were taking steps to endeavor to either settle it or put it in a posture for trial, and that while we had not filed our requests for information in the form of either interrogatories or in the form of depositions, we were accomplishing the same thing outside of the Court by interchange of letters.

Now, in the instant case, the Libellant is a seaman, and in attempting to further the case we have had an interrogatory outstanding which we noticed a year ago, and then we further noticed it. I did, on the 13th of September of this year, again write counsel on the other side asking

him whether it was going to be necessary to take the Court's

(4)

time with this or whether he would give me an answer.

The Court: Does your brief refer to that?

Mr. Wise: I thought it did, your Honor, but just as I looked at the schedule in here, in the brief, just now I seem to have omitted it—I beg your pardon; here it is. I gave you the wrong date. It was September 21. This is on page 4. "On September 21, 1966, Proctor for Libelant wrote Proctor for Respondent asking whether it would be necessary to bring the motion on for argument."

Now, at that time, mindful of the rule, I did also advise him that if I didn't have an answer within two weeks I would bring the motion on for a hearing. Through error on my part I failed to tell my secretary to put a follow-up on it so that I would take that action, and it did slip me, and it was not until I received the Court's motion that I did what I had said I was going to do in the letter.

But in addition we have, in the cases that I have cited to your Honor, which, incidentally, were—one was a civil suit, and as I understand the Court's decision there it based its position primarily on the fact that the seaman did not have a meritorious cause. In the instant case the fact that the man had an injury is not denied. That is admitted, that he had an injury. Whether or not he got it on

(5)

the vessel is not admitted. In other words, they say they know he had an injury but they don't know that he incurred it on the vessel, although their medical log, if available, would probably show what was recorded.

Now, the fact that the man did have an injury, whether it was received on the vessel or not, necessitates a duty of the vessel to give him prompt and adequate medical attention. The record here, through interrogatories, shows that

this infection was treated with a salve of some sort. The record also shows that there was not in the medical chest any penicillin or other type of ointment, although there is a statement in answer to the interrogatories which would indicate that there probably was. However, the list of the medicines in the medical chest do not include any such thing.

Libelant will be able to show, he expects, through a doctor that an infection in this area should have been promptly treated with one of the drugs of that nature. In addition to that, once we have established that, the burden will pass to the respondent to prove that even if he had been treated with such medication, the results that did ensue would have ensued.

That is why our request for answer to the interrogatory becomes very important because if, as we believe it

(6)

will show, if it is shown that there were several places where this man could have been put ashore, could have been given adequate and prompt medical attention, and he was not, then under the rule laid down by the Circuit Court of Appeals in the case of Holliday v. Pacific, the burden will shift to the Respondent to prove that even if he had been given that kind of treatment, the results that he has now would have ensued.

The Court: Mr. Wise, didn't Mr. Layton tell you as early as October of '64 in effect that he was not going to give you any further information voluntarily?

Mr. Wise: Yes, sir, he did.

The Court: Well, why didn't you go after him back there?

Mr. Wise: Well, as with all of us, we attempt, even when he get something like that, to get an answer without the need of burdening either the Court or taking extra time on paper.

The Court: Of course, one thing that makes me quite unsympathetic with your plea at the moment is the fact that this is not the first time you have been under a rule to either come forward or get out. There was an order entered by me on the 9th of October, 1964, calling your attention to the fact that no action had been taken for a

(7)

year and that the Court was going to dismiss the case on its own motion unless good cause were shown.

Now, here we have an action, meritorious or otherwise I don't know, but which was begun in October of 1962, four years ago. Now, stopping right there—we are under the whip here, the District Judges—I don't mean I in particular—by the Judicial Conference to use every reasonable effort to get cases which are three years old or more off of our calendar, either by trial or otherwise. Now, I pull out a jacket and I find here is a plaintiff who in '64 was told, "Why shouldn't this case be dismissed? You haven't done anything so far as the record shows for a year." Then I come along, I pull the jacket out again and find the same situation. Now, it seems to me it is a rather compelling situation to get it off the calendar.

In addition to that, the interrogatories which you have attached on your libel, which was filed on October 29, 1962, were answered on January 16, 1963—reasonably promptly. Then nothing was done about it until October 25, '65, which was a year and nine or ten months later.

Mr. Wise: May I interject at that point, something was done. At that point I wrote to the Proctor for the Respondent asking whether it was going to be necessary——

The Court: And in '64 you were told, "You have

(8)

been given all the information which seems to be material."

Mr. Wise: Yes, sir.

The Court: Now, then, there was a motion filed by you on October 25, '65. Then again nothing was done to bring it on for hearing until I entered the order on November 1, 1966.

It does not seem to me that the case of the Libelant in the instant action presents a very appealing one to take this case out of the ordinary situation that where there is no action in the Court here for a year's time it be dismissed, this being the second time that an order to that effect has been entered.

Mr. Wise: Well, your Honor says no action was taken in Court. As I have called to the Court's attention, we did once more try to avoid taking up the time of the Court, the paper work and the waste of time——

The Court: You told Mr. Layton if you did not hear from him you were going to file a motion in two weeks, and you didn't do it.

Mr. Wise: I slipped up.

The Court: Well, now, I tell you, I understand the plea you make on what you believe to be a meritorious claim, but in view of the pressures that we are under from the Judicial Conference, it does seem to me, for the reasons

(9)

I have stated on the record, that this is an appropriate case to be dismissed. Now, if the Court of Appeals feels otherwise about this, that maybe I am taking too rigorous a view in trying to do what I think the Judicial Conference desires, the Court of Appeals can tell me that and we will go ahead and try the case. But I feel that on the record I have, this case should be dismissed.

Mr. Wise: Does your Honor feel that that is consonant with your Honor's position as a guardian of this man?

The Court: I think it is consistent with this record. You are the guardian, you are the primary guardian of this

man, and if the man gets a guardian who is not diligent, I don't know that it is the duty of the Court to step in and take care of him.

Mr. Wise: Well, I wonder, sir, as this man is your ward, if the removal of counsel might not be the proper remedy, but not——

The Court: I am not going to supervise, Mr. Wise, the responsibilities of clients in the appointment of counsel. I am not going to take that on. All I am saying is that here we have had a record which twice has required me under our Rules to ask for a showing of cause why the case should not be dismissed for non-action, and it seems to me that it is

(10)

a case which should be dismissed for non-action, that there has not been really anything shown except the fact that you have a man that you do not want put out of Court. Now, I understand that, and that would be my desire if I stood in your shoes. But our positions are a little diferent, and our responsibilities are, I think, a little different.

Mr. Wise: I don't think very much different, sir, when we are dealing with a seaman.

The Court: Very well. I am going to enter an order dismissing the libel for the reasons I have stated. This will be transcribed——

Mr. Wise: Your Honor, are you dismissing it under the rule that was in effect a year ago or under the rule——

The Court: I am dismissing it under the current Federal Rule of Civil Procedure, which is applicable to admiralty actions. Now, there may be a question about the effect of that rule, Mr. Wise, insofar as I am applying it to an action which antedates its effectiveness, which was July 1, 1966.

Mr. Wise: The reason I ask is whether it is a dismissal with prejudice or without prejudice.

The Court: Well, it is a dismissal—what is your view about it, Mr. Layton?

Mr. Layton: I beg your pardon?

(11)

The Court: What is your view about it? Should this dismissal be with prejudice or without prejudice?

Mr. Layton: Well, sir, in the event that it is possible for it to be with prejudice, I am sure my client would want me to ask that it be. I don't know the law on the subject.

The Court: What does 41(b) say about it?

Mr. Wise: I know what 38 says, but I don't remember 41 for the moment.

Mr. Layton: 38 is no longer in existence.

The Court: Well, the point Mr. Wise makes is that it was in existence when this suit was begun and during the period when this one year time was running.

Mr. Wise: And therefore this rule did not become applicable, your Honor, until six months ago, the one under which your Honor is now dismissing.

Mr. Layton: I submit the presently extant civil rule is the one that governs this proceeding.

Mr. Wise: But that rule did not become effective until June, and therefore a year has not gone by with no action under that rule.

The Court: Well, Rule 41 says, "Unless the Court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in

(12)

in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits."

Mr. Wise: That was my recollection of 41.

The Court: The Court has within its discretion, it seems to me, to dismiss something without prejudice, it should suppose that for the most part, however, that these dismissals for failure to prosecute would be dismissals with prejudice. That is what I would think.

Mr. Wise: The only thing that I would think, your Honor, in fairness to the seaman, he can bring his action for maintenance and cure at any time. Now, if your Honor's dismissal is going to be a dismissal on the merits, you are precluding him from bringing an action for maintenance and cure, which he could bring ten years from now.

The Court: That is one of the causes asserted, is it not?

Mr. Wise: I beg your pardon?

The Court: That is one of the causes asserted?

Mr. Wise: Yes.

The Court: Isn't a Jones Act claim which we have here a civil claim rather than a maritime claim?

Mr. Wise: It is a claim in which the civil rights can be asserted either on the Admiralty side or on the

(13)

Civil side.

The Court: Well, Mr. Layton, you prepare an order, and I am going to dismiss the action, with prejudice, under Rule 41 and the local rule of the Court.

Mr. Layton: Yes, sir.

The Court: It is just as well for me to get some help from the Court of Appeals on these cases to see what they want me to do with them.

Mr. Wise: In doing it you are bearing in mind the fact that the applicable rule that your Honor is dismissing under, of the case not having had any action taken on it in a year, did not become effective until June, so that only less than five months have expired under that rule?

The Court: I have that point in mind.

I hereby certify that the foregoing is a true and accurate transcript from my stenographic notes in the proceeding.

EUGENE J. MAURER,
Official Court Reporter
U. S. District Court.

APPENDIX D.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE.

In Admiralty No. 1842.

AFFIDAVIT OF HENRY A. WISE, JR.

WILLIAM P. KENNEY

v.

CALIFORNIA TANKER COMPANY,
A DELAWARE CORPORATION.

STATE OF DELAWARE
NEW CASTLE COUNTY } *ss.:*

HENRY A. WISE, JR., being duly sworn according to law, deposes and says:

This Affidavit is submitted in support of Proctor for Libellant's Motion for re-argument and reconsideration.

The facts of the case are that Libellant received an injury while a seaman on the "S S Rocklanding" on February 21, 1960. By February 29, 1960 this injury had become infected and required Libellant's hospitalization at the San Pedro Hospital in California where it was necessary for him to receive antibiotic therapy and soaks. This treatment was continued for awhile and he then was transferred to the British Columbia Hospital on March 15th where the lesion was debrided and he received saline soaks. Thereafter on March 23rd he was admitted to the Public Health Hospital in San Francisco, California where a definite ulceration was noted and the soaks were con-

tinued. Thereafter and on April 26th he reported to the Brighton Marine Hospital where he was seen by Dr. Myron Hahn. A biopsy was done two days later and apparently no evidence of malignancy or infectious disease was noted. He remained in that hospital until May 13th and was treated as an out-patient there until approximately May 22nd. While there he was treated with a castor oil and zinc oxide applications with oral medication for the relief of pain.

Pain and sensitivity continued and he was examined on August 8, 1960 by Dr. Joseph A. Lipton at Lynn, Massachusetts where a local anesthetic ointment, "Quotane" in nature, was prescribed with a view to alleviating the pain. The pain persisted particularly after frictional contact and on June 6, 1966, the prior medication not having accomplished the purpose and he still being in need of medication, he consulted Dr. Conley L. Edwards at Wilmington, Delaware. Consideration was given to plastic surgery and this was ruled out and a further recommendation made with respect to an experimental alleviation of the frictional irritation. In addition, due to pain from coldness which was experienced particularly in the winter it was recommended that additional folds of wool be placed over the involved area. The effectiveness of this is yet to be determined as extreme cold weather has not been encountered.

Up to the present time and particularly up to the 25th of October, 1966 it was not possible to determine the extent of the permanent impairment and it is not yet possible to determine until the recommendations for coping with cold are carried out during the winter months.

Thus in the stature of the case as of October 25, 1966 it would have been premature to bring the case on for trial as it would have been necessary to speculate as to what the cumulative effects of the three recommendations for alleviating the condition would be.

Proctor for Libellant therefore could only have filed some meaningless document to make the one-year rule inapplicable.

On September 23, 1964 when Proctor for Libellant previously wrote the Court, it was believed that a report as to whether plastic surgery would be necessary would complete the medical preparation. It was not until the examination by Dr. Conley Edwards that it was discovered that plastic surgery was not only not recommended but that the danger of it was greater than any anticipated value and that further methods to attempt to alleviate the condition needed to be explored.

It is estimated that if reconsideration is granted and this case is not removed from the docket, sufficient information should have been gained by the early spring of 1967 to know the extent of the permanency of this injury.

Further deponent sayeth naught.

/s/ HENRY A. WISE, JR.
Henry A. Wise, Jr.

SWORN TO and SUBSCRIBED before me this 15th day of November, A. D. 1966.

/s/ ELEANOR C. BALDWIN,
Notary Public.

APPENDIX E.

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE.

IN ADMIRALTY No. 1842.

ORDER OF DISMISSAL.

WILLIAM P. KENNEY,

v.

CALIFORNIA TANKER COMPANY, A DELAWARE CORPORATION.

AND Now, to wit, this 16th day of November, 1966, a hearing having been held on the 10th day of November, 1966, pursuant to the Order of this Court dated the 1st day of November, 1966, at which hearing Libellant failed to establish good reason for his inaction in this cause for a period in excess of one year, and it appearing that the Court had theretofore, on the 22nd day of October, 1964, held a similar hearing by reason of the inaction of Libellant, it is

ORDERED, ADJUDGED AND DECREED that this action be and it is hereby, pursuant to F. R. C. P. 41(b) and Rule 12 of this District, dismissed with prejudice by this Court sua sponte.

/s/ STEEL, *D. J.*

APPENDIX F.

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE.

IN ADMIRALTY No. 1842.

WILLIAM P. KENNEY,

v.

CALIFORNIA TANKER COMPANY, A DELAWARE CORPORATION.

ORDER DENYING REARGUMENT.

AND NOW, TO WIT, this 16th day of November, 1966, the motion of Libellant for reargument having been presented to and duly considered by the Court.

IT IS ORDERED, that the motion for reargument be denied.

/s/ STEEL, *D. J.*

APPENDIX G.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16488

C. A. MISC. RECORD No. 589.

WILLIAM P. KENNEY,
Appellant,

v.

CALIFORNIA TANKER COMPANY,
A DELAWARE CORPORATION.

(D. C. No. 1842 In Admiralty)

Present: HASTIE, GANEY and SEITZ, *Circuit Judges.*

ORDER TO PROCEED AS A SEAMAN WITHOUT PREPAYMENT OF COSTS.

Upon consideration of the Petition by Appellant for leave to proceed as a seaman without prepayment of costs, and affidavit in support thereof,

It is ORDERED that leave be, and hereby is granted Appellant to proceed on this appeal as a seaman without prepayment of fees or costs or giving security therefor, and to file typewritten briefs and appendix;

It is further ORDERED that leave be, and hereby is granted Appellant to docket this appeal and file record out of time as of the date of this order.

By THE COURT,

WILLIAM H. HASTIE,
Circuit Judge.

Dated: February 23, 1967.

APPENDIX H.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16488

WILLIAM P. KENNEY,
Appellant,
v.
CALIFORNIA TANKER COMPANY,
A DELAWARE CORPORATION.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Argued June 9, 1967

Before: STALEY, *Chief Judge,* KALODNER, *Circuit Judge,* and SHERIDAN, *District Judge.*

OPINION OF THE COURT OF APPEALS.

(Filed July 28, 1967)

By STALEY, *Chief Judge.*

The issue presented in this appeal is whether the district court erred in dismissing with prejudice a libel in admiralty because of libellant's failure to take any action in the case for one year. After a hearing to determine whether the libellant had good reason for his inaction, the district court dismissed the libel and denied the libellant's motion for reargument. We have thoroughly reviewed the record and conclude that the district court properly exercised its power in dismissing the case.

On October 29, 1962, libellant filed a libel in personam with interrogatories attached. Respondent filed its answer to the libel and answers to the interrogatories on January 16, 1963.

No further action appears on the docket until October 9, 1964, when the district court, sua sponte, ordered that the libel would be "dismissed pursuant to Rule 12 of this court" unless good reason for the lack of action in the case for one year were shown at a hearing.[1] About one week later, the libellant filed a motion to have the respondent more fully answer one of the original interrogatories. The same day, the libellant made a request of the respondent for admissions of fact. Respondent replied to the request for admissions, but it refused to answer more fully the interrogatory on the basis that the original answer was sufficient. The libellant did not bring the motion on the interrogatory before the court for a hearing, nor was the action dismissed at that time.

About one year later, on October 25, 1965, libellant again filed a motion to compel a full answer to the disputed interrogatory, but again, no effort was made to bring the matter before the district court.

Finally, on November 1, 1966, the district court entered another order that the court, "sua sponte, will dismiss the action with prejudice under F.R.C.P. 41(b) and Rule 12 of this District" unless the libellant could establish at a hearing good reason for its inaction since October 25, 1965. Characteristically, libellant filed three days later a new motion to compel an answer to the disputed interrog-

1 Rule 12 of the United States District Court for the District of Delaware provides:

"Dismissal of Actions for Failure to Prosecute.

"Subject to the provisions of Rule 23(c), F.R.C.P., in each cause pending, wherein no action has been taken for a period of one year, the Court may, on its own motion or upon application of any party and after reasonable notice, enter an order dismissing such cause unless good reason for the inaction is given. An application for a continuance shall not be deemed to be action precluding such dismissal. After any such application for dismissal has been filed, no application for a continuance or any proceeding taken under the discovery rules, F.R.C.P., shall be deemed to toll the application of this rule."

atory. A hearing on the proposed order to dismiss was held on November 10, 1966, and orders dismissing the suit and denying libellant's post-hearing motion for reargument were entered on November 16, 1966.

The libellant argues that although the court could have dismissed the case for failure to prosecute without relying on any rule other than its inherent power, here the court erred because it felt compelled to dismiss under F. R. C. P. 41(b) and Local Rule 12. This is said to be error because neither of these rules applied to this admiralty action until July 1, 1966, when the Admiralty Rules were amended to conform with civil practice. 383 U. S. 1039 (1966). Thus libellant argues that the application of the rules is "retroactive" and violates both due process and the Supreme Court's order that the new rules not be applied in pending cases where their application "would work injustice." 383 U. S. 1031 (1966).

This argument is totally without substance. Under the formerly applicable Admiralty Rule 38, the trial court was empowered to dismiss a libellant's case for failure to prosecute. The district courts could implement this rule by their own calendar practice. Boudreau v. United States, 250 F. 2d 209 (C. A. 9, 1957). The fact that Admiralty Rule 38 provides for dismissal upon the respondent's motion, as does F. R. C. P. 41(b), would not preclude the district court from dismissing sua sponte. As was said in Link v. Wabash R. R., where the plaintiff argued that F. R. C. P. 41(b) by negative implication prohibits involuntary dismissal except on motion by the defendant, no restriction on the district court's power should be implied: "The authority of a court to dismiss *sua sponte* for lack of prosecution has generally been considered an 'inherent power,' governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." 370 U. S. 626, 630-631 (1962). This power necessary to the court to control its docket is no less necessary on the Admiralty side,

and there are no policy reasons compelling us to find that language of Admiralty Rule 38 authorizing an involuntary dismissal on the respondent's motion should give rise to the negative implication that the court could not dismiss sua sponte where no implication arises under the analogous F. R. C. P. 41(b). Thus, there could be no prejudice to the instant libellant from the application of F. R. C. P. 41(b) or Local Rule 12 because the same rule on dismissal for want of prosecution would obtain under the former Admiralty Rule 38. Boudreau v. United States, supra; Terhune v. Prudential S. S. Corp., 283 F. 2d 467 (C. A. 2, 1960).

Finally, libellant asserts that even if the district court had the power to dismiss his suit with prejudice, the instant dismissal was an abuse of discretion. In support of this he urges that due to the type of injury complained of, he could not yet get a competent doctor to express a reasonable opinion about it, although he still had discovery pending. It is true that the injury is novel: libellant asserts that while on board respondent's vessel, he caught his penis in the zipper of his fly, the resulting abrasion became infected, and the respondent breached various duties to him by failing to put him ashore at a place where he could secure competent medical attention. Libellant did receive maintenance and cure for a few months after the injury in 1960.

We recognize, as did the district court, that as a seaman, the libellant is a ward of the court and he is entitled to beneficent treatment. Torino v. Texaco, Inc. —— F. 2d —— (C. A. 3, filed May 16, 1967) However, the district courts also have the responsibility to secure the just and speedy and inexpensive determination of every action. F. R. C. P. 1. The exercise of the court's power to dismiss for failure to prosecute "* * * is necessary in order to prevent undue delays in the disposition of pending cases and to avoid congestion in the calendars of the District Courts." Link v. Wabash R. R., 370 U. S. at 629, 630. Here the libellant was warned over two years before the final

order of dismissal that the case would be dismissed if he did not make efforts to prosecute the case, but the record clearly indicates that libellant made only token efforts toward this end. A myriad of cases could be cited for the proposition that we will not reverse the district court's dismissal absent a clear abuse of discretion, e.g., Link v. Wabash R. R., supra; Torino v. Texaco, Inc., supra; Terhune v. Prudential S. S. Corp., supra, and we find no such abuse of discretion in this case.

The judgment of the district court will be affirmed.

APPENDIX I.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16488

WILLIAM P. KENNEY,

Appellant,

v.

CALIFORNIA TANKER COMPANY,
A DELAWARE CORPORATION

(D. C. No. 1842 IN ADMIRALTY)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Present: STALEY, *Chief Judge,* KALODNER, *Circuit Judge,* and SHERIDAN, *District Judge.*

JUDGMENT OF THE COURT OF APPEALS

This cause came on to be heard on the record from the United States District Court for the District of Delaware and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the District Court, filed November 16, 1966, be, and the same is hereby affirmed, with costs.

Attest:

M. ELIZABETH FERGUSON,
Chief Deputy Clerk.

July 28, 1967

APPENDIX J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16488

WILLIAM P. KENNEY,

Appellant,

v.

CALIFORNIA TANKER COMPANY,
A DELAWARE CORPORATION.

ORDER SUR PETITION FOR REHEARING

Present: STALEY, *Chief Judge,* MCLAUGHLIN, KALODNER, HASTIE, SMITH, FREEDMAN, SEITZ, VAN DUSEN, *Circuit Judges,* and SHERIDAN, *District Judge.*

The petition for rehearing filed by Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

STALEY,
Chief Judge.

Dated:
August 30, 1967

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FILED
DEC 28 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967.

No. 856

WILLIAM P. KENNEY,
Petitioner,

v.

CALIFORNIA TANKER COMPANY, a Delaware corporation,
Respondent.

BRIEF IN REPLY TO PETITION FOR A WRIT OF CERTIORARI.

RODNEY M. LAYTON,
DAVID T. DANA, III,
RICHARDS, LAYTON & FINGER,
4072 Du Pont Building,
Wilmington, Delaware,
Attorneys for Respondent.

December 26, 1967.

International, 711 So. 50th St., Phila., Pa. 19143—Tel. SA 7-8711 Area Code 215

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5 Am. Jur. 2d 170, Appeal and Error § 727	6
2 C. J. S. 324, Admiralty § 190	7
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OPINIONS BELOW.

The opinion of the United States Circuit Court of Appeals for the Third Circuit, dated July 28, 1967, is reported at 381 F. 2d 775.

STATEMENT OF THE CASE.

In this brief, references abbreviated (PA) are to pages of Petitioner's Appendix.

Petitioner seeks the United States Supreme Court's review of the Third Circuit Court of Appeals' ruling which affirmed the District Court for the District of Delaware's *sua sponte* dismissal of his action for failure to prosecute.

The Petitioner, a seaman, began this suit on October 29, 1962, by filing a Libel in Admiralty with 13 numbered interrogatories attached. Respondent answered both the libel and the interrogatories on January 16, 1963. Then, for more than 20 months, no action of any kind was taken in the case.

On October 9, 1964, the District Court first ordered Petitioner to show cause why his action should not be dismissed for failure to prosecute. The impending dismissal prompted the Petitioner to assert that Respondent's answer to Interrogatory No. 13 was inadequate and to request certain admissions of fact. Respondent promptly responded to these discovery procedures by informing Petitioner's counsel that no further answer was required to Interrogatory No. 13 and by responding to the Admissions of Fact on November 13, 1964, well within the stipulated time for response. The Court did not dismiss the action at this time but gave Petitioner a chance to pursue his discovery.

Two years passed. On November 1, 1966, for the second time, the District Court ordered the Petitioner to show cause why the case should not be dismissed for failure to prosecute. On November 10, 1966, the full history and status of the case was discussed before the Court. Peti-

tioner had an opportunity to explain his inaction, but the case was in the same status that it had been for two years. The District Court ruled that the case be dismissed for failure to prosecute, and on November 16, 1966, the District Court's orders dismissing the action and denying Petitioner's motion for reargument were entered.

QUESTIONS PRESENTED.

I. SHOULD CERTIORARI BE DENIED WHERE THE REASON FOR SEEKING REVIEW IS ONLY THAT THE COURT BELOW STATED THE WRONG REASONS FOR REACHING ITS RESULT?

II. SHOULD CERTIORARI FOR REVIEW OF A CIRCUIT COURT'S AFFIRMATION OF A DISCRETIONARY JUDGMENT BE DENIED?

ARGUMENT.

I. The United States Supreme Court Should Not Grant Certiorari on a Petition Reciting Only That Both Trial and Appellate Courts Below Stated the Wrong Reasons for Reaching the Right Decision.

A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefore. (U. S. Sup. Ct. Rule No. 19), The District Court for the District of Delaware and the Third Circuit Court of Appeals each fully heard argument on the issues presented by this petition for writ of certiorari. The issues now presented for a third hearing are simply whether the District Court has power to dismiss a case for failure to prosecute; and if so, whether that power has been abused under the circumstances of this case.

Petitioner's suit was dismissed for his failure to prosecute it. Petitioner seeks certiorari because the two courts below stated they dismissed the case pursuant to a rule of court rather than stating that it was done under the court's inherent power (PA 13-15).

It is beyond question that Federal courts have power to dismiss actions *sua sponte* for failure to prosecute. *Link v. Wabash R. Co.*, 370 U. S. 626, 82 S. Ct. 1386, 8 L. Ed. 2d 734, 6 F. R. Serv. 2d 41(d) 11, Case 1 (1962), rehearing denied 371 U. S. 873, 83 S. Ct. 115, 9 L. Ed. 2d 112. Admiralty cases provide no exception to this inherent power. *Boudreau v. U. S.*, 250 F. 2d 209 (9th Cir., 1957). Petitioner has not demonstrated any Federal question of substance, nor has he demonstrated that the Circuit Court has rendered a decision in conflict with the decision of an-

other Court of Appeals on the same matter (U. S. Sup. Ct. Rule No. 19).

All Petitioner has urged is that the Circuit Court and the District Court stated the wrong reason for their decision. Assuming, but not conceding, that the reason stated for the decision was wrong, this is no "special and important" reason justifying a review on writ of certiorari. Generally, an appellate court is concerned with the holding of the court below, not the reasoning of its opinion. 5 Am. Jur. 2d 170, Appeal and Error § 727; See, *Helvering v. Gowran,* 302 U. S. 238, 58 S. Ct. 154, 82 L. Ed. 224 (1937).

Petitioner's argument that certiorari should be granted because the District Court dismissed the action under a rule of court promulgated pursuant to the court's inherent power—rather than having dismissed it pursuant to the inherent power itself—is without merit.

II. Certiorari to Review a Discretionary Judgment Should Be Denied.

"Special and important" reasons for grant of certiorari do not exist when the matter to be reviewed lies within the discretion of the trial judge.

The decision whether to dismiss an action for failure to prosecute is purely discretionary with the trial judge. *Link v. Wabash R. Co., supra; Moore's Federal Practice,* ¶ 41.11[2] (2d ed. 1964). That Petitioner is a seaman does not change the discretionary nature of the District Court's decision. See: *Edmond v. Moore-McCormack Lines, Inc.,* 253 F. 2d 143 (2d Cir.), cert. den. 358 U. S. 843, 79 S. Ct. 73, 3 L. Ed. 2d 82 (1958).

The United States Supreme Court will not ordinarily disturb a discretionary action of the court below, where that action has a reasonable basis. 36 C. J. S. 671, Federal Courts § 204(21). In admiralty cases it has been held that

there is a presumption of the correctness of the trial judge when the intermediate appellate court has approved of his action. 2 C. J. S. 324, Admiralty § 190; *The Sabine v. The Richmond*, 103 U. S. 540, — S. Ct. —, 26 L. Ed. 313 (1880), reh. den. 103 U. S. 542, — S. Ct. —, 26 L. Ed. 450

In the present case Petitioner has shown no conflict in interpretation of the *Link v. Wabash* holding that the Federal courts have the inherent power to dismiss actions *sua sponte* for failure to prosecute. The decision presented for review is nothing more than an ordinary discretionary judgment that, in fairness, the Petitioner's dilatory prosecution required a dismissal. Certiorari has been dismissed as improperly granted when, on examination, the court finds an ordinary case without issues of "far-reaching importance", or where there is no asserted conflict between two Circuit Court cases. See: *United States v. Rimer*, 220 U. S. 547, 31 S. Ct. 596, 55 L. Ed. 578 (1911); *Layne and Bowler Corp. v. Western Well Works, Inc.*, 261 U. S. 387, 43 S. Ct. 422, 67 L. Ed. 712 (1923).

Petitioner simply has not presented the considerations governing review on certiorari. This is an ordinary case with no "special and important" reasons. The Court of Appeals has rendered no decision in conflict with the decision of any other court of appeal, no important question of Federal law is presented, no Federal question has been decided in conflict with applicable decisions of the United States Supreme Court.

The District Court's discretionary judgment is not presented as so far a departure from the accepted and usual course of judicial proceedings as to call for an exercise of the United States Supreme Court's power of supervision. For almost four years Petitioner failed to prosecute his case. On two occasions he was reminded by the court that his case could be dismissed for failure to prose-

cute. The District Court has a responsibility to secure just, speedy, and inexpensive determination of every action. The court has surely acted pursuant to this responsibility in giving the Petitioner two chances, two years apart, to either prosecute his case or explain why it has not been prosecuted. The entire history of the case heralds Petitioner's dilatory prosecution. It is no abuse of discretion to have dismissed this case for failure to prosecute. Surely, it was a decision well within the guide lines provided by the local District Court Rule No. 12 (PA 6) cited with approval by the U. S. Supreme Court in *Link v. Wabash, supra.*

CONCLUSION.

It is respectfully submitted that the petition for a writ of certiorari be denied for the reason that no special and important reasons therefor have been shown.

Respectfully submitted,

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